No. 24

In the

Supreme Court of the United States

OCTOBER TERM, 1943

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

C. M. JOINER LEASING CORPORATION AND C. M. JOINER,

RESPONDENTS' ANSWERING BRIEF

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THE ISSUE

The issue is whether sales of leases by these respondents, C. M. Joiner Leasing Corporation and C. M. Joiner, as its president as made, were securities within the meaning of the Statute.

THE DISTINCTION

The Petitioner brought suit against three defendants and included these respondents. The other defendant did not contest the matter enough to hire a lawyer. This was just another wild-cat well like hundreds of others in Texas, and there was such a small amount involved that Johnson merely let an injunction issue and went on with whatever other business he had.

C. M. Joiner was interested in the matter only through ownership of stock in and as president of the corporation. The corporation was not organized for the purpose of exploiting or drilling one well. It had drilled many wells and owned leases and royalties in a number of counties of Texas. In spite of the suit, it went ahead and completed the well as a producer of gas and would have been producing gas in commercial quantities at this time had governmental restrictions permitted it to purchase pipe to connect it to the pipe line. No leases have been sold by it since filing the suit and no leases are for sale.

All leases sold by it were commercial and every purchaser, at the date of the purchase, and now, can, under Texas law, drill his own well, and is assured of gas and a possibility of oil. Of the 254 counties in Texas, four-fifths are said to be producing oil.

As far as any need of an injunction in this case goes, there was never any necessity for it, and if one is granted, it will be futile, the whole question being moot and academic.

THE STATUTE

The Statute (Petitioner's Brief, p. 2) mentions fifteen kinds of securities all of which except one, are paper evidences of something of value and adds "or, in general, any interest or instrument commonly known as 'security'."

Certainly, if a gas or oil lease on land had been intended by Congress to be included as a "security", it missed a beautiful opportunity to list it as such for, surely, not even Petitioner's counsel would claim that a gas and oil lease is or has ever been "commonly known" as a "security."

Concededly, Congress could call a general warranty a lease, a mineral deed, or possibly a marriage license a "security" and from that time on it would be one. But Congress has not called an oil and gas lease as such, a "security."

What the Petitioner is attempting here is to persuade the court to usurp the functions of Congress and do a little legislating for it. No reason appears for its restraint in calling upon Congress to add another phrase to the act. Congress has enacted thousands of rules, regulations, laws, edicts, restrictions, and directions, and authorized the scores of alphabetical bureaus to enact other thousands of rules for the citizen to break at his peril. Why would not the Securities and Exchange Commission petition the Congress rather than this Court to amend the statute?

MEANING OF STATUTE

There is no question here, at all, except as to the meaning of the Statute. If the Statute includes the ordinary oil and gas lease, then Petitioner is right in its contention. But, unless it does, then clearly Petitioner should fail.

We assert confidently that, to an ordinary reader, an oil and gas lease on land is not included in the Statute. Certainly, if an oil, gas, or other mineral lease had been meant to be included, it would have been a futile thing to add "fractional, undivided, interest in oil, gas or other mineral rights." For surely, the greater would have included the lesser.

But it may be asked why may not a 100% lease be classed as a security, if a fractional undivided interest in oil, gas or other mineral rights is made so by the Statute? The

answer is obvious. The promoter who takes a tract of 1,000 acres of land and sells 10,000 "interests" therein will get his money out only when he sells all the interests, and when he does that, he is no longer an owner with something to gain by bringing in a well. Indeed, every acre he sells decreases his motive to succeed.

That is not the case when he sells a commercial lease. The driller has what he calls a drilling block of from 40 to 160 acres which he retains for himself and sells off whatever acreage he can around this block, usually to obtain the money with which to drill. That was not the case here, however; the C. M. Joiner Leasing Corporation, while it did not have enough money to drill the well when it started, owned land, leases and royalties in other fields and actually spent over twice as much money in completing the well as it took in by the sale of leases.

THE RULE OF CONSTRUCTION

The rule of construction applicable here is that words in an act will be taken as being **in pari materia, and** that **expressio unis est exclusio alterius.**

The Act lists "Any 1) note, 2) stock, 3) treasury stock, 4) land, 5) debenture, 6) evidence of indebtedness"—each and all papers representing some kind of ownership in something supposed to be tangible, but at the same time not carrying with it any right of possession, control or direction.

Then, the Act lists "7) collateral trust certificate, 8) preorganization certificate or 9) subscription, 10) transferable share, 11) investment contract, 12) voting trust certificate, 13) certificate of deposit for a security,"—and

each of these is a proper certificate purporting to give a right to profit in some way, but not, at all, parting with title to any tangible property, and not conveying to the purchaser anything beyond a right to participate. And, each of these is called a "security", and all of them have something in common.

Then the Statute lists "14) fractional undivided interest in oil, gas or other mineral rights." Notice that it does not say "in oil, gas or other mineral lands, leases or royalties", but, "rights." Now, just what an oil right, or gas right, or mineral right may be might be the subject of some debate. But, let us assume the broadest possible meaning for it and take "deed" and "right" as synonymous. The reason for the inclusion may appear in the fact that a fractional undivided interest assumes some of the characteristics of stock in that some oil drillers instead of selling, outright, a portion of their holdings, as respondent, C. M. Joiner Leasing Corporation, did, in the case at bar, sought to retain control of the entire area, and obtain whatever advantage there might be in a larger spread of acreage and at the same time obtain funds to finance the drilling of their wild-cat wells.

Following the inclusion of "fractional undivided interest in oil, gas or other mineral rights", the language used is "or, in general, any interest or instrument commonly known as a 'security'."

Thus, it is apparent that Congress had no thought of including oil, gas or other lands or interests in lands or leases on lands, in which the purchaser has a complete severance of title and is free to do as he pleases with his lease.

Hundreds of people in the East Texas Oil Field purchased a lease upon just a few acres of ground, when the president of the company which is respondent here, as well as himself a respondent, was in the act of bringing in the great East Texas Oil Field, and after paying rentals for several years, drilled wells or had them drilled under such leases and profited greatly thereby.

It is common knowledge that, in an early field in Texas some purchasers who bought leases at a nominal price saw the same leases later sell for as much as one hundred thousand dollars per acre.

SUMMARY OF ARGUMENT

Under this heading, petitioner has made an argument so specious that one is surprised that eminent counsel would present it to a **nisi prius** court much less to a court of such dignity and learning as this court. Grasping for some nail upon which to hang its argument, it picks out "investment contract" (thirteen on the list) as including an oil or gas lease and hitches its argument to that vague expression. In a sense, a purchase of any kind could be called an "investment contract." The housewife who grapples with ration cards, these days, doubtless considers she has made an investment contract when she musters a sufficient number of "points" and enough ready cash to buy a beef roast. But, Congress had no such idea when it passed this Act. It was not including land or leases or royalties or interest in such except when "fractional undivided interest in oil, gas or other mineral rights" were being sold.

Indeed, counsel get themselves out upon a limb in their zeal to stretch the Statute to this attenuated point. Their

very statement that courts have found an "Investment Contract" in the case of a large number of schemes for the **purported** "sale" or "lease" of some form of real * * * property under **an arrangement whereby the seller retains possession and control of the subject of the "sale" or "lease" with a view to earning a profit for the nominal owners or lessees** (bold face ours), (brief, p. 6), shows to what dire need counsel was put for an illustration; for, certainly no such case is made by these facts.

And, the statement that "measured by these tests, the transactions here in question clearly involve the sale of a security" is a mere begging of the question. It neither proves anything nor does it follow from anything proven.

And, the statement that "they have made a speculative investment in a common enterprise from which they hope to secure a profit entirely through the efforts of Respondent Joiner in bringing in a successful well and thus increasing the value of all of the surrounding acreage" is not based upon fact, in that there is and was no common enterprise. Each purchaser has full title to his lease and not one dollar could, would or did go to any one of them upon the C. M. Joiner Leasing Corporation's completion of a commercial gas well. Had the company brought in as great a field as the Rusk County Field in East Texas, not one cent of its profits would have gone to any purchaser; therefore, there could have been no common enterprise, any more than when a purchaser buys a town lot when a railroad is built, or a war plant locates, or deep water for the port is planned. Such a purchaser makes his money, if at all, not from the seller but from the use or sale of his lot to someone else for more than he paid for it.

Of course, when one deals in sophistry, he runs from one false conclusion to another with shameless ease, as witness this gem of legal lore: "The mere fact that real property was involved does not take the transaction out of the category of a 'security' transaction."

Shades of Blackstone and Storey; of Devlin and Thompson! Since when, did land become a security? Imagine a man's advertising a sale of "securities" and asking customers to meet him at a certain spot and there pointing out some prospective city lots as "securities."

Webster's Unabridged Dictionary defines securities as "Evidence of debt, or of property, as stock certificates, bonds and the like."

The new **International Dictionary** defines it in the same language as Webster, and adds "a document giving the holder the right to demand and receive property not in his possession."

Words and Phrases under the heading "securities", quotes several definitions, among them: "Written assurances for the return or repayment of money or evidences of indebtedness." **Jaffe v. Goldner**, 251 Ill. App. 188, and "the term 'securities' in its ordinary meaning does not cover deeds to realty." **People v. Jackson**, 74 P. (2d) 1090.

Corpus Juris, 59, p. 1279, defines securities: "In common commercial parlance the term is understood to refer to live and negotiable obligations.

"It has been held not to include cash in bank; nor contracts for future delivery of a commodity; nor jewelry; nor judgments; nor land; nor mere choses in action, nor

real estate and mortgages of an insolvent." 56 C. J., p. 1280.

But counsel for petitioner defines it as "land."

Of course, if real property, land, leases of land, interests in land, not fractional but entire, are "securities", petitioner is right. But that is the issue.

Nor, is any force lent to the argument by the earnest desire and partisan enthusiasm of learned counsel.

Right here, let us come to an understanding as to who is the respondent in this case. The record shows that suit was brought against C. M. Joiner, C. M. Joiner Leasing Corporation and John Johnson doing business as Miller Leasing Company. Joiner did not own a foot of the lease which was the property of the C. M. Joiner Leasing Corporation. There were other stockholders. The corporation paid for drilling the well (not once, but more than twice) before it was completed at a depth of about 1,700 feet as a commercial producing gas well. Johnson was not much of a promoter; else, he would not have been selling leases near a drilling well at $15.00 per acre. The evidence fails to show that he made enough profit on his sales to pay his advertising and postage bills.

The evidence shows positively that the C. M. Joiner Leasing Corporation sold only $2,600.00 worth of leases to Johnson and $758.50 to others, making a total of $3,350.00, whereas the first contract price to drill the well was $5,000.00 and several times the amount realized on sale of leases was spent in completing the well, including cost of casing.

Where was there anything wrong? Johnson just was not able to fight the case and this gave courage to attorneys to proceed and spend many times the amount of sales in government funds, taking expensive depositions and rolling up hundreds of dollars in clerk's, reporter's and printer's bills, to say nothing of valuable time of men who ought to be engaged in some more worthy cause.

And for what? To try to induce this court to say that land is a security, within the meaning of the statute!

We come back to the assertion that there is only one respondent here and that is C. M. Joiner Leasing Corporation. No sales were made by C. M. Joiner, and Johnson is no longer a party.

The issue, then, is squarely and, certainly, **narrowly**, whether sales of leases made either directly to purchasers by C. M. Joiner or other officers or agent of the company or, indirectly, through Johnson, are or were inhibited by the terms of the Statute, for the reason that such sales were sales of securities as there defined.

ARGUMENT

Again, we bow to a master legal mind that can come so close to facing an issue and then so cleverly side-step it by non sequiturs. Counsel continues to assume without proving their conclusion.

Where is there one iota of evidence that the **respondent** sold more than an "interest in land" or "sold interests in a business enterprise to persons who were led to expect that they would profit through efforts of the seller?"

The fate of this country today almost hangs in balance, so dependent are our armed forces upon the production of oil. Should oil, in the United States, suddenly cease to be produced and none be produced for one year, we would probably lose the war and might become a subservient nation. Certainly the war could not be won without it.

Counsel have some sort of vague notion that people in Texas and other states who deal in Texas leases think, when they buy an oil and gas lease that they have bought a bond. Figures show that for every wild-cat well that produces oil there are literally hundreds of "dry holes."

Counsel go into a tailspin in discussing the design and purpose of the securities act. At least the dissertation is rather elementary and wholly beside the mark.

What relevancy is there in the obvious fact that "material facts bearing on the value of securities offered through the mails or in interstate commerce" be honestly disclosed.

Counsel fumble for some portion of the Statute upon which to pin their case and always come back to "Investment Contract." They point out that the Statutes of thirty states contain these delightful words; but, they utterly fail to cite one case holding that an investment contract is synonymous with any kind of deed to land, or gas or oil lease, unaccompanied by some other agreement as to management and earning of profits.

The cases cited, all, turn upon something beyond and in addition to a deed or lease. And, naturally so; for if it be a lease or deed that ends the matter. The buyer is on his own. But, if he gets a deed coupled with an interest in the well, or buys a fractional interest in the well, he comes

within the Statute. The difficulty confronting petitioner is in stretching a plainly written Statute to fit a cock-eyed theory of what the law ought to be rather than of what it is.

It will be noted that notwithstanding the fact that a majority of the states have the magic words, "Investment Contract" in a similar statute, yet not a single court in a single one of the thirty states as far as we know, has ever held that a deed or oil lease in the standard form is an "investment contract", and counsel are relegated to the doubtful effort of lifting themselves over the fence by their own boot straps, by citing petitioner's own findings in the **Natural Resources Corporation Case**, 8 S. E. C. 635. Why not further strengthen their case by citing their findings in the case at bar? It reduces to an absurdity.

Counsel, admitting the issue is narrow, persistently and consistently dodge a discussion of the Statute. They lay down an untenable premise and arrive at an illogical conclusion.

At page 12 of their brief, they state again, as they had before, and as they do over and over again, with an air of **ipse dixit**, that "it is immaterial whether their shares in the enterprise take the form of stock or bond ownership, or of nominal interests in the physical assets employed in the enterprise. When these conditions are present, the substance controls the form, and a sale of a 'security' in the nature of an 'investment contract' occurs." **But**, just as soon as they attempt to apply this pronouncement, they cut the ground out from under themselves by putting in the conditions, not present in the case at bar, that the schemes comprehend "an arrangement by which the seller

retains possession and control of the subject of the 'sale' or 'lease' with a view to earning a profit for the nominal owners or lessees." Of course.

And again witness page 14 of the brief, where with the utmost **sang froid**, counsel say, without demonstrating, and without support in the testimony, "The transactions in this case fall well within the limits of the tests thus enunciated. The circumstances readily establish that the purchasers have not merely acquired leasehold interest in specific parcels of realty, but rather have made a speculative investment in a common enterprise from which they hoped to secure a profit through the activities of respondent Joiner." What circumstances? How? To what extent? What investment have they made except what Judge Kennemer points out—the same as any man who buys a piece of land?

There is not a line of testimony in the case to justify this statement and not an authority from a reputable court to sustain it.

Mild misstatements, also, occur, as appears in the quotation "Following a well recognized pattern in the sale of oil and gas leases to the public, Joiner first found an area in which there was little indication of oil." There was no evidence either that Joiner or any other oil driller, "following a well recognized pattern" first found an area in which there was little indication of oil. On the contrary. Counsel cites the evidence of an inactive ex-geologist, who so far as the record goes drilled but one well and that was a dry hole. (R. p. 104A.) He was also a biased witness, working for petitioner, and missed his guess as to there being no oil in that particular county. (F. pp. 66A, 113A.) It is also

a matter of common knowledge that new fields are being rapidly developed in all parts of central and west Texas.

Counsel also misquote the record when they state "Then **after organizing the respondent company,** in whose name he obtained a lease on 3,000 acres, etc." (Brief, p. 15.) The C. M. Joiner Leasing Corporation had been operating for several years prior to obtaining possession of the 3,000 acres of leases.

Also, the statement that "Joiner caused to be sent to over 1,500 individuals * * * promising that he was going to help his 'many friends' ", is misleading. The references to the record do not support the statement. That is nothing in the first reference even remotely suggesting such a statement. The second reference (R. p. 125A) is to a circular put out by Johnson and in the letter purportedly signed by Joiner, contained therein, there is no such statement. The only approach to the statement is by Johnson who stated "That his greatest ambition is to again duplicate his East Texas Discovery, thereby rewarding his many friends who have kept faith with him." Clearly that was Johnson's version. It was, however, literally true, **believe it or not.**

Defendant Joiner testified positively he never saw Exhibit 4 until the trial and that he did not write the letter dated December 11, 1940 included therein and that he never wrote such a letter; that Johnson had taken an old letter five or six years old and made some changes in it (R. p. 88A, 89A); also, that he had used the word "Paramount" only one time since the well was started and that was in a

letter to Johnson. (R. 89A.) Johnson admitted that he named the well the Paramount well.

"Q. Mr. Joiner had nothing on earth to do with calling it the Paramount, did he?

"A. He didn't call it that yet.

"Q. He never did call it Paramount, that was your language?

"A. I termed that the Paramount well to distinguish it from other wells he was drilling." (R. p. 64A.)

Johnson testified that he did not know whether Mr. Joiner ever saw Exhibit 4 or not. (R. p. 66A.)

That exhibit contained two of the three quotations on page 15 of petitioner's brief, which, while absolutely true, were never seen by Mr. Joiner.

Likewise, the quotation at the top of page 16 is from a letter Johnson sent out and that Joiner never saw.

Attention is also called to the fact that Joiner and not the purchasers selected the drilling contractor and arranged the terms of the drilling contract and the contractor not the purchasers selected the drilling site. (Brief, p. 17.) Why the statement? What does it prove? Has there ever, since the first oil well was drilled, been a case where this exact procedure was not followed?

And as to selection of leasehold location, Johnson had contracted to get the closest unsold leases to the well for his customers,—certainly to the advantage of the customer, in case a producer was brought in.

Counsel also advances a gratuitous conclusion in these words: "Other factors here present reinforce the conclu-

sion that the purchasers have not bought realty for their own use but rather have made an investment in a common enterprise, the value of which depended on the efforts of the promoter. Many of the investors live at great distances from the site of the property of which they are the nominal lessees." (Brief, p. 17.)

Either counsel are very naïve or are woefully unfamiliar with oil field history in Texas. The original East Texas field which was brought in by this same C. M. Joiner is 40 to 60 miles long, and five to thirteen miles wide and every inch of it has been bought or leased in plots ranging from one-fourth acre to many hundreds of acres and by persons in practically every state of the union and many foreign countries. And not a one of them considered himself a "nominal lessee." And five hundred million dollars is a conservative estimate of the amounts realized by purchasers of leases in that territory.

Counsel's reference to the small size of the leases is meaningless. The old spacing rule was for wells to be 300 feet apart, which made 2½ acres the standard drilling site. Since the war began (February 18, 1943) the 20-acre spacing was put into effect to restrict the number of wells. But even that rule has no legal meaning in a new field. When a man buys 2½ acres—either, in fee or by lease, prior to the drilling of the first well. In California, derricks touch derricks, so small are the drilling sites. In the Beaumont field, brought in before any spacing rules, wells were put down on tracts too small for a derrick, easement for drilling purposes being reserved on adjoining tracts.

The third statement on page 15 refers to a letter dated August 16, 1941 by C. M. Joiner Leasing Corporation, and

shows on its face that on August 15, 1941 it was stamped "Securities and Exchange Commission. Received Fort Worth Regional Office."

Likewise pages 167A and 175A show similar markings.

Thus, plaintiff's Exhibits 17, 18 and 19 have the stamp of plaintiff and each one contains language as follows: "Because these securities are believed exempted from registration, they have not been registered with the Securities and Exchange Commission; but such exemption, if available, does not indicate that the securities have been either approved or disapproved by the Commission or that the Commission has considered the accuracy or completeness of the statements in this communication."

This language, Defendant Joiner testified he got from the Securities and Exchange Commission, and that before sending out any sales letters copies were filed, twenty-four hours in advance, with plaintiff, and he got a receipt for each one. Also that these three letters were the only letters sent out by him.

Likewise counsel deliberately state (Brief, p. 15) "Heavily emphasized was the fact that this was on 'investment' and that those who purchased would be investors in 'one of Mr. Joiner's greatest achievements'."

Anyone reading all of page 15 would naturally think this refers to what Defendant Joiner or C. M. Joiner Leasing Corporation had done. Yet there is no such language on page 56A of the record and page 141A refers to a letter sent out by John T. Johnson and the meaning is entirely changed by the statement as made and above quoted. Here is the actual sentence, and the only sentence containing

the word investment: "We sincerely hope that this will reward you handsomely with a nice profit on your investment, because we believe that this well is destined to be one of Mr. Joiner's greatest achievements." (R. 141A.) And that letter was written not by either of these defendants but by Johnson.

The stated comparison of the amount involved as to the cost of a well in McCulloch County is also unfair. The contract in evidence called for a payment of $5,000.00, 3/5 of which was to be paid as the well progressed and 2/5 upon completion of the well. Yet counsel say that wells in that portion of Texas cost from $10,000.00 to $21,600.00. (Brief, page 18.) Counsel also ignore the well-known fact that an exploratory well usually costs several times as much as later wells, for the reason that the structure has been determined. It took three years to bring in the first producer in East Texas and, later, similar wells were drilled in ten days,—at a fraction of the cost of the discovery well.

The utterly unsupported statement that "this indicates that the investors had no intention of independently developing their holdings is inexcuseably without warrant. Over thirty thousand wells have been drilled in one field in East Texas, by far the greater number of which were upon small tracts.

Likewise, the statement that "These factors, together with other physical and economic considerations limiting the number of profitable wells in so barren an area as McCulloch County", is an utter assumption, founded upon the testimony of an ex-geologist who stated "There are no producing oil fields in McCulloch County." Whereas the trial

judge found that "subsequently and quite recently, in fact, oil has been found in that particular county." (R. p. 116A.)

Counsel whip themselves up to a false conclusion by building upon so many false premises and half quoting, half misquoting, so many matters of fact that, with all due respect, we feel they are lacking in a full comprehension of the facts in this case.

To petitioner's sole proposition we present a simple

COUNTER PROPOSITION

The Statute having undertaken to define the term "Security", the courts are without power or jurisdiction to add another class of conveyances to the act.

STATEMENT

The Statute is set out on page two of petitioner's brief and will not be repeated.

An oil and gas lease is not listed in the Statute as a "Security"; but, fractional undivided interests in such leases are listed.

ARGUMENT

The fact that Congress did not originally list "fractional undivided interest in oil, gas, or other mineral rights" in the definition of security shows that the matter was later called to its attention. That was the time when, if Congress had intended to include oil and gas leases in the definition, it could easily have done so. In fact, it would have been much simpler than to select out "fractional undivided interest in" such leases and denominate it as a "security." Also, the fact that Congress thought the original language

was broad enough to include "Certificates of interest in oil, gas or mineral leases or royalties" shows that Congress was considering such "certificates" and, later, such "fractional undivided interest in oil, gas or other mineral rights" was added to clarify the Statute.

It is inescapable that Congress did not intend to do a futile thing. It would have been a futile thing to make a fractional undivided interest a security, if an entire interest had already been declared to be one. Nor is there any support in the authorities cited by petitioner for the fantistic view advanced.

The **Atherton** case comes clearly within the Statute, and leaves no reason for judicial legislation.

No other reported court case even mildly supports petitioner's contention.

The question is tersely summed up in the opinion in the Circuit Court of Appeals when the court says: "To hold that such sales and assignments, which as stated, are interests in land, are sales of securities would be stretching and straining the coverage of the Act far beyond what Congress intended."

The only observation we would make as to the reasoning of the appellate court is as to its failure to bottom its decision, as did the trial court, upon the proposition that if Congress had intended to include oil and gas leases as securities, it would have done so in so many words and not left it to a strained judicial construction.

As stated by the trial court "One can hardly justify the reading of a Statute which has flaws in it such as this

Statute, in such way as to cover what it manifestly does not cover."

"The very wording * * * excludes, because it mentions leases but mentions the kind of lease, and the leases here are not the kind of leases mentioned in the Act." (R. p. 117A.)

In the **Atherton** case, no matter what else they got, each purchaser obtained an undivided fractional interest in the residuary property. The court, in that case, states plainly "Clearly the investor acquired more than a mere lease."

In the case at bar, the appellate court said: "We think however, the true test is the title or rights of the purchaser after his purchase, i.e., what title, right or interest the purchaser had after all had been said and done with respect to his purchase." (R. p. 199.)

While we do not believe it necessary to quote from authorities to prove our contention that an oil and gas lease is an interest in land and, therefore, not a security as "commonly known", yet we do think it not amiss to direct the court's attention to its own decision in the case of **Downman v. State of Texas**, 231 U. S. 353, 58 L. ed. 264, holding that "different elements of the land are capable of being severed and separately owned."

Other authorities to like effect are:

Central Coal and Coke Co. v. Casselowey, 46 Fed. 540; same case, 45 Fed. (2d) 744;

R. R. Commission v. Rowan, 310 U. S. 579.

This court has many times expressed itself as the proper construction of language that might be given more than meaning or construction as witness:

Arthur v. Cumming, 91 U. S. 362, 23 L. ed. 438, which holds that "descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of Acts, in which they are found."

Other cases are:

Moseley v. Fikes, 126 S. W. (2d) 599;
Stephens v. Mid Kansas, 113 Tex. 160;
Texas Co. v. Dougherty, 107 Tex. 226;
Bashara v. Saratoga, 163 S. W. (2d) 631;
Hager v. Slakes, 294 S. W. 842;
Sheffield v. Hogg, 124 Tex. 290;
Quintana v. State, 127 S. W. (2d) 357.

The conclusion seems to be sound that **first**, an oil and gas lease is "land" and therefore not a security, as commonly understood or commonly known; **Second**, that Congress has, plainly, not included such a lease as a "Security"; and, **Third**, that, only by judicial legislation, can such a lease become a security in the sense of the Statute.

Well recognized rules of interpretation would have to be violated to hold contrary to such conclusion. It is such holding that petitioner asks the court to make, while we urge that the court adhere to established rules.

In our opinion, this great court has quite a large sphere in which to operate, merely deciding the law as it is, rather than invading the province of the legislative branch and declaring something to be the law which was not, in the opinion of thinking men, the law before such declaration. For that is legislation,—a function another great branch of the Federal Government exercises.

CONCLUSION

For the reasons stated, we respectfully urge that the decisions of the lower courts be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 24.—October Term, 1943.

Securities and Exchange Commission, Petitioner, *vs.* C. M. Joiner Leasing Corporation and C. M. Joiner.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 22, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The Securities and Exchange Commission brought this action in District Court to restrain respondents from further violations of §§ 5(a) and 17(a)(2) and (3) of the Securities Act of 1933.[1] The District Court denied relief and the Circuit Court of Appeals affirmed upon a construction of the statute which excludes from its operation all trading in oil and gas leases. As this presents a question important to the administration of the Act we granted certiorari.[2]

Respondents and one Johnson, a defendant against whom a decree was taken by consent, engaged in a campaign to sell assignments of oil leases. The underlying leases, acreage from which was being sold, are not in the record. They required, as appears from the assignments, annual rental in case of delayed drilling of $1 per year. It also seems that these leases were granted by the land owners on an agreement that a test well would be drilled by the lessees. One Anthony blocked up leases on about 4,700 acres of land in McCulloch County, Texas, in consideration of drilling a test well. Defendant Joiner testified that he acquired 3,002 of these acres for "practically nothing except to drill a well." Anthony was a driller and agreed to do the drilling which the Joiner Company undertook to finance, expecting to raise most of the funds for this purpose from the resale of small parcels of acreage. The sales campaign was by mail addressed to upwards of 1,000 prospects in widely scattered parts of the country and actual purchasers, about fifty in number, were

[1] 48 Stat. 74, 15 U. S. C. § 77e(a) and § 77q(a), (2), (3).

[2] — U. S. —.

located in at least eighteen states and the District of Columbia. Leasehold subdivisions offered never exceeded twenty acres and usually covered two and a half to five acres. The prices ranged from $5 to $15 per acre. The largest single purchase shown by the record was $100, and the great majority of purchases amounted to $25 or less. All buyers were given the opportunity to pay these sums in installments, and some did so.

The sales literature nowhere mentioned drilling conditions which the purchaser would meet or costs which he would incur if he attempted to develop his own acreage. On the other hand, it assured the prospect that the Joiner Company was engaged in and would complete the drilling of a test well so located as to test the oil-producing possibilities of the offered leaseholds. The leases were offered on these terms: "You may have ten acres around one or both wells at $5 per acre cash payable by August 1st, 1941 and $5 per acre additional payable November 1st, 1941 or thirty days after both wells are completed." Other language in the advertising literature emphasized the character of the purchase as an investment and as a participation in an enterprise.[3]

The trial court made findings of what amounted to fraud, and the Circuit Court of Appeals approved, saying, "the evidence

[3] The following are extracts from letters signed by the Joiner Company and by Joiner: "We are pleased to report our Concho County well drilling at approximately 2510 feet in a very good formation. We are sending out 800 feet of 8¼ inch casing to be run in the McCulloch County well tomorrow. Both wells should be completed during next month . . . This offer goes to you who now have a lease around one or both of these locations, and also to you who have at some time invested in a lease or leases around some well that the C. M. Joiner Interests have drilled. . . . we are submitting this proposition to you in language that will appeal only to business people who are interested in making an investment where they have a good chance for splendid returns on the investment." "There has nothing happened to, either of these wells that would lessen the prospects for the opening of a new oil field. . . . We feel that if we are to get the law of average that one or both these wells should be producers. I know you would like the thrill that comes to those owning a lease around a producing well. . . . if you send in an order for twenty acres . . . you will get ten acres Free in the next block of acreage we drill which is most likely to be in Concho County, Texas. You will really be in the oil business." "Remember, if *you* do not make money on your investment it will be impossible for us to make money. . . . Fortunes made in oil go to those who invest. We believe you should invest here, and now!"

There is also on the circulars and selling letters the following statement: 'Because these securities are believed exempted from registration, they have not been registered with the Securities and Exchange Commission; but such exemption, if available, does not indicate that the Securities have been either approved or disapproved by the Commission or that the Commission has considered the accuracy or completeness of the statements in this communication.'

The origin of this is uncertain from the evidence. Joiner says he "got it" from the Commission. What weight, if any, should be given under the cir-

would justify stronger findings of fraud."[4] However, both courts refused injunction because, as the Court of Appeals stated, it could "find simply sales and assignments of legal and legitimate oil and gas leases, i.e., sales of interests in land." It was thought that these assignments could not be proved to be "securities" or "investment contracts" under § 2(1) of the Act.

Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition. Purchasers then would have been left to their own devices for realizing upon their rights. They would have anticipated waiting an indefinite time, paying delayed drilling rental meanwhile until some chance exploration proved or disproved the productivity of their acres. Their alternative would have been to test their own leases at a cost of $5,000 or more per well.[5]

But defendants offered no such dismal prospect. Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. The drilling of this well was not an unconnected or uncontrolled phenomenon to which salesmen pointed merely to show the possibilities of the offered leases. The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense; the undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung. An agreement to drill formed the consideration upon which Anthony was able to collect leases on 4,700 acres. It was in return for assumption of this agreement that Joiner got 3,002 of the acres, leaving Anthony about 1,700 acres for his trouble. And it was his undertaking to drill the well which enabled Joiner to finance it by the sale of acreage. By selling from 1,000 to

cumstances to this characterization of what was being sold as "securities" is not clear. They had to be securities to be exempt securities under the Act. 15 U. S. C. § 77c.

[4] The nature of the misrepresentations is not material to the question here. They related generally to the location of the properties in respect of producing territory.

[5] Joiner's well was to cost over $5,000. The estimated average cost of drilling wells in West Central Texas is about $10,000. See table reproduced in House Hearings on H. Res. 290 and H. R. 7372, 76th Cong., 3d Sess. (1939) Pt. I, p. 350.

2,000 acres at from $5 to $15 per acre, he could fulfill his obligation to drill the well, recoup his incidental expenses and those of the selling intermediaries, and have a thousand acres left for the gamble, with no investment of his own; and if he sold more, he would have a present profit. Without the drilling of the well, no one's leases had any value, and except for that undertaking they had been obtained at no substantial cost. The well was necessary not only to fulfill the hopes of purchasers but apparently even to avoid forfeiture of their leases.

Whether, as the dissenting Judge below suggests, the assignee acquired a legal right to compel the drilling of the test well is a question of state law which we find it unnecessary to determine. The terms of the offering as quoted above, either by itself or when read in connection with the agreement to drill as consideration for the original leases, might be taken to embody an implied agreement to complete the wells. But at any rate, the acceptance of the offer quoted made a contract in which payments were timed and contingent upon completion of the well and therefore a form of investment contract in which the purchaser was paying both for a lease and for a development project.

It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.

It is urged that the definition of "security" which controls the scope of this Act[6] falls short of including these transactions. Respondents invoke the "*eusdem generis* rule" to constrict the more general terms substantially to the specific terms which they follow. And they invoke the ancient maxim "*expressio unius est exclusio alterius*" to exclude sales of leasehold subdivisions by the agre because the statute expressly includes sales of leasehold subdivisions by undivided shares.

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[6] Section 2(1) of the Act, 15 U. S. C. § 77b(1), provides:

"The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase, any of the foregoing."

Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass.[7] However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.[8]

In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security." We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or

[7] In the first edition of Statutes and Statutory Construction by Sutherland he no doubt expressed the impression gleaned from extensive reading of cases when he wrote in the preface (1890): "The natural tendency and growth of the law is towards system and towards certainty, towards modes of operation at once practical and just, by the process of its intelligent judicial administration; but this process is impaired by overwork and legislative interference." In the third edition (1943) Horack observes in the preface: "The third edition reflects the growing acceptance of statutes as a creative element in the law rather than, as Sutherland suggested in the first edition, as 'legislative interference'."

[8] This Court has refused to follow the "ejusdem generis" rule, even in criminal cases, where its application seemed to conflict with the general purpose of an act. United States v. Gilliland, 312 U. S. 86, 93; Prussian v. United States, 282 U. S. 675, 679; and Gooch v. United States, 297 U. S. 124, 128; see also Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 88-89.

It has also treated the maxim "expressio unius est exclusio alterius" as but an aid to construction. United States v. Barnes, 222 U. S. 513, 519; Springer v. Philippine Islands, 277 U. S. 189, 206; Neuberger v. Commissioner, 311 U. S. 83, 88.

courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security.'" The proof here seems clear that these defendants' offers brought their instruments within these terms.

It is urged that because the definition mentions "fractional undivided interest in oil, gas or other mineral rights," it excludes sales of leasehold subdivisions by parcels. Oil and gas rights posed a difficult problem to the legislative draftsman. Such rights were notorious subjects of speculation and fraud, but leases and assignments were also indispensable instruments of legitimate oil exploration and production. To include leases and assignments by name might easily burden the oil industry by controls that were designed only for the traffic in securities. This was avoided by including specifically only that form of splitting up of mineral interests which had been most utilized for speculative purposes. We do not think the draftsmen thereby immunized other forms of contracts and offerings which are proved as matter of fact to answer to such descriptive terms as "investment contracts" and "securities."

Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate.[9] In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering.[10] The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

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[9] Downman v. Texas, 231 U. S. 353; Texas Co. v. Daugherty, 107 Tex. 226; Railroad Commission v. Rowan & Nichols, 310 U. S. 573, 579.

[10] One's cemetery lot is not ordinarily thought of as an investment and is most certainly real estate. But when such interests become the subjects of speculation in connection with the cemetery enterprise, courts have held conveyances of these lots to be securities. In re Waldstein, 160 Misc. 763, 291 N. Y. S. 697; Holloway v. Thompson, 42 N. E. 2d 421 (Ind. App.). For other instances where purported sales of property have been held "investment contracts" see S. E. C. v. Crude Oil Corporation of America, 93 F. 2d 844 (interest in oil royalties sold as bill of sale for specified number of barrels of oil); S. E. C. v. Tung Corporation of America, 32 F. Supp. 371, S. E. C. v. Bailey, 41 F. Supp. 647 (land bearing tung trees, to be developed by seller); S. E. C. v. Payne, 35 F. Supp. 873 (silver foxes); Prohaska v. Hemmer-Miller Development Co., 256 Ill. App. 331 (farm land,

Finally it is urged that we must interpret with strictness the scope of this Act because violations of it are crimes.[11] Some authority is cited and a great array could be assembled to support the general proposition that penal statutes must be strictly construed. An almost equally impressive collection can be made of decisions holding that remedial statutes should be liberally construed. What, then, shall we say of the construction of a section like this which may be the basis of either civil proceedings of a preventive or remedial nature or of punitive proceedings, or perhaps both?

Different courts have given different answers to the general question.[12] Since 1911, all states except Nevada have enacted some type of "Blue Sky Law." While the laws are not uniform, they generally contain both civil and criminal sanctions, and all have the dominating purpose to prevent and punish fraudulent floating of securities.[13] The weight of authority is committed to a liberal construction,[14] although some courts tend toward strict construction,[15] and some have seemed to differentiate according to the use being made of the statute, inclining to a strict construction when a criminal penalty is being imposed and a more liberal one when civil remedies are being applied.[16]

But this Court, as early as 1820, speaking through Chief Justice Marshall, said: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction

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to be paid for with proceeds of crops raised by vendor); Kerst v. Nelson, 171 Minn. 191, 213 N. W. 904 (land to be cultivated as a vineyard by a third party); Stevens v. Liberty Packing Corp., 111 N. J. Eq. 61, 161 Atl. 193 (rabbits).

[11] 15 U. S. C. § 77t.

[12] See 3 Sutherland on Statutory Construction (3d ed. 1943) § 5703.

[13] Smith, State Blue Sky Laws and the Federal Securities Act, 34 Michigan Law Review 1135.

[14] See note 10 *supra*; Wagner v. Kelso, 195 Iowa 959, 193 N. W. 1; Wigington v. Mid-Continent Royalty Co., 130 Kan. 785, 288 Pac. 749; People v. Montague, 280 Mich. 610, 274 N. W. 347; State v. Hofacre, 206 Minn. 167, 288 N. W. 13; State v. Pullen, 58 R. I. 294, 192 Atl. 473; Kadane v. Clark, 135 Tex. 496, 143 S. W. 2d 197; Klatt v. Guaranteed Bond Co., 213 Wis. 12, 250 N. W. 825.

In Texas itself, oil and gas leases have been held by the Supreme Court to be securities within the state act, notwithstanding the fact that the act expressly includes only "any interest in or under" such leases. Kadane v. Clark, *supra*.

[15] Westenhaver v. Dunnavant, 225 Ala. 400, 143 So. 823; Somers v. Commercial Finance Corp., 245 Mass. 286, 139 N. E. 837; New Amsterdam Casualty Co. v. Hyde, 148 Ore. 229, 34 P. 2d 930; Miller v. Stuart, 69 Utah 250, 253 Pac. 900.

[16] See 3 Sutherland on Statutory Construction (3d ed. 1943) § 7104 and cases cited in note 8 thereunder.

itself. . . . It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend." *United States* v. *Wiltberger*, 5 Wheat. 76, 95.

This rule in substance was repeated in *United States* v. *Hartwell*, 6 Wall. 385, 396, which said also: "The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." The principle has been followed in *United States* v. *Corbett*, 215 U. S. 233, 242; *Donnelly* v. *United States*, 276 U. S. 505, 512; *United States* v. *Giles*, 300 U. S. 41, 48.

In the present case we do nothing to the words of the Act; we merely accept them. It would be necessary in any case for any kind of relief to prove that documents being sold were securities under the Act. In some cases it might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; if it were offered in a criminal case, it would have to meet the stricter requirement of satisfying the jury beyond reasonable doubt.

We hold that the court below erred in denying an injunction under the undisputed facts of this case and its findings. The judgment is

Reversed.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.